IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~84~~ 19

UNITED STATES OF AMERICA,

Appellant,

vs.

MILTON C. JORN.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR MILTON C. JORN, APPELLEE

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CITATIONS

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Opinion Below

The order of the district court dismissing the information on the ground of double jeopardy is not reported, but is set forth in the Appendix at page 60. A transcript of the proceedings at the trial is reproduced in the Appendix at pages 33-46.

Jurisdiction

The order of the district court dismissing the information was entered January 9, 1969 (A 60). The Notice of Appeal to this Court was filed in the district court on February 7, 1969 (A 61-62). The jurisdictional statement

was filed on April 9, 1969, and the Court noted probable jurisdiction on October 13, 1969 (A 63). The Government alleges jurisdiction of this Court to review, on direct appeal, "a judgment dismissing an information on the ground of double jeopardy" pursuant to 18 U.S.C. 3731 (Br. 1-2). The Government has misconstrued the statute. That statute states that an appeal may be had from an order "sustaining a motion in bar, when a defendant *has not been put in jeopardy*". 18 U.S.C. 3731. (Emphasis added.) It is submitted that this Court has no jurisdiction to hear this appeal because the defendant *has* been put in jeopardy and hence an appeal cannot be taken based upon 18 U.S.C. 3731. Since the issue presented with regard to jurisdiction and the issue presented by the merits of the case are identical (whether the defendant was in jeopardy), a statement of the basis for defendant's assertion that a direct appeal does not lie in this case will not be set forth here but will be stated in the argument, *infra*.

Questions Presented

1. Whether in a criminal case the United States Government can pursue a direct appeal to the Supreme Court pursuant to 18 U.S.C. 3731 where the trial court has sustained a motion of defendant to dismiss on the ground of double jeopardy after defendant's first trial was terminated when the judge discharged the jury after evidence had been taken, upon concluding that the prosecution witnesses could not be allowed to testify because they had not been adequately warned of their Constitutional rights not to incriminate themselves.

2. Whether the Constitutional prohibition against Double Jeopardy prevents retrial of a defendant whose first trial was ended when the trial judge dismissed the jury which had been sworn, after evidence had been taken, upon concluding that prosecution witnesses could not be allowed to testify because they had not been adequately warned of their Constitutional rights not to incriminate themselves.

Statement

Defendant was charged on February 23, 1968, on a twenty-five count information alleging that he had wilfully and knowingly aided and assisted, counseled, procured and advised the preparation and presentation of income-tax returns which were false and fraudulent as to material matters in violation of 26 U.S.C. 7206(2) (A 1-21). He was brought to trial in the United States District Court for the District of Utah on August 27, 1968, at which time twelve jurors were chosen and sworn (A 22, 34). Out of the presence of the jury, the Government moved to dismiss fourteen of the counts charged and to substitute an amended eleven-count information (A 34). The motion was granted, the amended information was filed (A 36), and defendant was arraigned on the amended information (A 37). He pleaded not guilty to each of the eleven counts. *Ibid.* The jury then returned to the courtroom and the Government's first witness, an Internal Revenue Service official, was called to identify the income-tax returns at issue and the returns were received as evidence (A 38-40).

With the exception of the Internal Revenue official through whom the income-tax returns were introduced in evidence, all of the witnesses for the Government were

taxpayers whom appellee was accused of aiding and assisting (A 34). These witnesses were in attendance at court under subpoena. When the Assistant United States Attorney called the first of these taxpayers, counsel for the defendant sought and was granted permission by the court to make the following statement:

> In view of the transcript in the preliminary hearing in this matter, it is my feeling that each of these taxpayers should be warned as to his Constitutional rights before testifying, because I feel there is a possibility of a violation of the law (A 40).

Following this statement, the court advised the witness that he was not obligated to respond until he had consulted an attorney, who "is a very important fellow in a situation like this" (A 40-41). After having fully advised the witness of his Constitutional rights against self-incrimination, the court stated:

> • • • Well, what do you want to do?
>
> The Witness: Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it farther in this court.
>
> The Court: Have you talked to a lawyer?
>
> The Witness: No, sir.
>
> The Court: *I am not going to let you admit it any further in this court.* That is all there is about that. The admissions you have already made were very likely obtained from you without telling you what your Constitutional rights are.
>
> The Witness: No, sir.
>
> The Court: What is that?

The Witness: We were advised at the time we were first contacted by the Internal Revenue Service.

The Court: If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. They don't do that. What they do is: They send an agent around to check your books, and he doesn't tell you about those things. They don't start telling you what we are talking about here until they decide there should be a criminal prosecution and they are about to present the matter to that department of the Internal Revenue Service that investigates the possibility of a criminal prosecution • • • (A 41-42). (Emphasis added.)

The court would not allow the witness to testify (A 41). Upon ascertaining from the prosecutor that the remaining Government witnesses were similarly situated, the court, without notice to counsel, summarily dismissed the jury (A 43). The court then called the remaining taxpayer witnesses before him and warned them all, as he had the first, of their right to see an attorney prior to testifying. He stated that he would not let them testify until they had done so and he had talked to them again (A 45).

When the matter later appeared on the court calendar for a new trial setting, defendant's motion for dismissal of the amended information on the grounds of double jeopardy was granted (A 60).

Summary of Argument

The question presented in this case is whether, under the facts, the defendant, whose trial was interrupted when the court dismissed the jury because, in his opinion, the prosecution witnesses had not been properly prepared to testify, may be retried consistent with the Fifth Amendment guarantee against double jeopardy. Defendant will show that this Court has consistently allowed retrial *only* in cases where there was "manifest necessity" to dismiss the jury. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Simmons* v. *United States*, 142 U.S. 148 (1891); *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Gori* v. *United States*, 367 U.S. 364 (1961); *Downum* v. *United States*, 372 U.S. 734 (1963); *United States* v. *Tateo*, 377 U.S. 463 (1964). There was no manifest necessity for dismissal of the jury in the instant case.

Discharge of the jury before it has reached a verdict is a discretionary matter with the trial court. However, that discretion is to be exercised "only in very extraordinary and striking circumstances," *Downum* v. *United States*, *supra*, at 736. This Court has found "manifest necessity" for dismissal of the jury and has allowed retrial under the following circumstances: Where the jury has failed to reach a verdict; where a juror was prejudiced; where the defendant sought a continuance; where continuance was granted in order to protect the rights of the defendant; and where retrial was occasioned by unforeseeable circumstances brought on by the exigencies of war. The instant case demonstrates none of these circumstances. This Court has held that the Double Jeopardy clause prevents retrial where dismissal of the original jury was caused to aid

the prosecution, or where such dismissal tends to harass or prejudice the defendant. The facts of the instant case fit squarely in this category. The jury was dismissed to prevent a directed verdict of acquittal for defendant and defendant cannot now be retried.

ARGUMENT

I.

Under the Fifth Amendment to the United States Constitution, After Jeopardy Attaches Retrial Is Allowed Only When Extraordinary and Striking Circumstances Show That There Was a "Manifest Necessity" for Dismissal of the Jury Prior to Verdict in the First Trial.

The Fifth Amendment to the United States Constitution provides, in part:

> • • • Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; • • •

The circumstances which will invoke the protection of this provision do not arise in every case where a jury is discharged prior to reaching a verdict. The cases are clear that retrial may be had in cases where a mistrial was requested by the defendant, or where a conviction is reversed on defendant's motion, unless such motion is provoked by improper acts of the court or prosecutor. See *e.g. Bryan* v. *United States,* 338 U.S. 552 (1949); *Forman* v. *United States,* 361 U.S. 416 (1960). In all other cases the test as to when retrial will be permitted is verbalized in terms of whether there was a "manifest necessity" for the premature termination of the initial trial in order to

protect the rights of the accused and of society. A trial, so terminated, does not bar retrial. See Note, 77 Harv. L.Rev. 1272, 1276 (1964).

The Government, in its opening brief, strongly intimates that the discharge of the jury in the instant case was caused by defendant and was in his interest (Br. 6, 15-16) and that this case should be treated as a case where mistrial was granted on defendant's motion. This is entirely incorrect. The record is clear that counsel for defendant made no motion for dismissal of the jury and was given no chance to object to the dismissal (A 40, 43-44). The obvious reason for defense counsel's failure to object to the dismissal was "because of the precipitous course of events, there was no opportunity for such objection". *Gori* v. *United States,* 367 U.S. 364, 365 n.6 (1961). Failure to object under those circumstances cannot be held a waiver of defendant's Fifth Amendment right against Double Jeopardy.

The doctrine of "manifest necessity" arose in the case of *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824) where this Court stated:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

The "manifest necessity" causing the mistrial in the *Perez* case was the fact that the jury was unable to agree on a verdict. Certainly, the "ends of public justice" would be defeated if retrial was not allowed under those circum-

stances. However, the Court, in *Perez,* stated that the power to discharge the jury "ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious causes . . ." Thus, the trial court is not unlimited in its discretion to discharge the jury. Abuse of that discretion will bar retrial. *Downum* v. *United States,* 372 U.S. 734 (1963); *Cornero* v. *United States,* 48 F.2d 69 (9th Cir. 1931).

In *Wade* v. *Hunter,* 336 U.S. 684 (1949), this Court allowed retrial by court-martial after the commanding general of the 76th Division withdrew the charges from the original court-martial and directed it to take no further proceedings. The reason for withdrawing the charges from the original court-martial was that due to the tactical situation of the division involved, certain witnesses could not be called. Since the division in which the court-martial was convened had advanced significantly from the scene of the alleged crime, this Court found that there was a "manifest necessity" for discontinuing the trial and rescheduling it before a court-martial convened near the scene. Thus, the tactical situation presented by a rapidly-advancing army was held to justify retrial. It appears that the only other alternative would have been to have held the defendant in custody pending stabilization of the war to such a point that the officers of his division could return to the scene of the alleged crime to reconvene the court. This certainly would not have been in defendant's interest.

In both *Gori* v. *United States,* 367 U.S. 364 (1961) and *United States* v. *Tateo,* 377 U.S. 463 (1964), retrial was allowed in the interest of protecting the defendant. In *Tateo,* the defendant's original conviction was set aside on his motion after it was determined that his guilty plea

entered during trial had been coerced. In *Gori*, the mistrial was declared in order to protect the defendant from supposedly prejudicial evidence.

Since the defendant in *Tateo* obtained reversal of his initial conviction through a collateral attack, it was not unreasonable to hold that he should stand trial before another jury. As the Court in *Tateo* stated:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *United States* v. *Tateo*, 377 U.S. 463, 466 (1964).

The attempted retrial of defendant in the instant case did not result from a reversal on appeal obtained by defendant, but was granted after the court refused to allow the prosecution witnesses to testify, in order to prevent a verdict of acquittal in favor of defendant. In this regard, this court in *Tateo* stated:

> If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain. *United States* v. *Tateo*, 377 U.S. 463, 468 n.3 (1964).

In *Gori*, the court of appeals concluded that the trial judge, in granting the mistrial, "vas acting according to his convictions in protecting the rights of the accused."

Based upon the findings of the court of appeals and upon the "skimpy record" before it, this Court held that the judge did not abuse his discretion in granting the mistrial. This Court upheld retrial in *Gori* because:

> [T]he mistrial order upon which his claim of jeopardy is based was found neither apparently justified nor clearly erroneous by the Court of Appeals in its review of a cold record. What that court did find and what is unquestionable is that the order was the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—*in favor of the accused. Gori* v. *United States,* 367 U.S. 364, 367 (1961). (Emphasis added.)

Gori is clearly distinguishable from the facts of the instant case. In the instant case the trial court found that the witnesses were not prepared to testify and refused to allow them to do so (A 41, 45). The jury was discharged because these were all of the Government's witnesses (A 34) and without them the Government could not go on with its case. Since the Government could not have put on its case without these witnesses, any "extreme solicitude" on the part of the judge in the instant case was in favor of the Government rather than the accused. Retrial after dismissal on this basis is clearly "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict . . ." *Downum* v. *United States,* 372 U.S. 734, 736 (1963).

II.

There Were No "Extraordinary Circumstances" Indicating a "Manifest Necessity" for Dismissing the Jury in the Instant Case and Such Dismissal Constitutes Harassment of the Defendant and an Aid to the Prosecutor.

For proper analysis the action of the trial court must be divided into two distinct steps: First, the court found that the witnesses were not prepared to testify and refused to allow them to testify (A 41, 45); next, the court summarily dismissed the jury. After having taken the first step, whether rightly or wrongly, the next step did not necessarily follow. The available alternatives indicate absolutely that there was no "manifest necessity" for dismissal of the jury. If the court felt that these witnesses needed legal counsel before testifying, it could have accomplished this end by a short recess without dismissing the jury.

The trial judge abused his discretion in discharging the jury prior to a verdict. That abuse was prejudicial to defendant's right to be tried by the jury empaneled to hear his case. There were no "extraordinary or striking circumstances", *Downum* v. *United States, supra,* at 736, nor was there a "manifest necessity" for discharging the jury, *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824).

This Court, in *Downum* v. *United States, supra,* made it clear that retrial would not be allowed under the Fifth Amendment Double Jeopardy clause where dismissal of the jury was occasioned by a lack of preparation on the part of the prosecution or was to aid the prosecutor. In that case, the prosecutor had not checked to see if his wit-

nesses were present before he announced he was ready to empanel a jury. When it was found that one critical witness was missing, the judge discharged the jury over defendant's objection.

Under the trial court's interpretation of the law and the facts, the jury in the instant case was also dismissed because the prosecutor was not prepared to go forward with his case. If the trial court is correct in its interpretation of the requirements of the Fifth Amendment right against self-incrimination, the prosecutor should have been aware of the law and should have so prepared his witnesses. In that regard, the instant case is indistinguishable from *Downum*. If, on the other hand, the law is not as the trial court thought it was, his dismissal of the jury was nevertheless solely for the protection of the prosecutor's case and still within the *Downum* rule since there was no way the prosecutor could have obtained a conviction without the witnesses.

The facts here are distinguishable from those in *Gori* and *Tateo,* since in both of those cases mistrial was granted in order to protect the defendant. The reason stated by the trial court for dismissal of the jurors in the instant case was to allow for preparation of the prosecution witnesses. This was a finding made by the trial court after observation of the witnesses and should not be overturned unless clearly erroneous. Even assuming that finding to be erroneous in law, it nonetheless caused the dismissal of the jury after jeopardy had attached. It gave no benefit whatsoever to the defendant since he was prepared to go forward to a verdict with the jury empaneled to hear his case. As this Court stated in *Downum,* 372 U.S. at 738, any doubt should be resolved "in favor of the liberty of the

citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."

Conclusion

Defendant had been put in jeopardy within the meaning of the Fifth Amendment prohibition against Double Jeopardy, and a direct appeal does not lie under 18 U.S.C. 3731. Defendant respectfully requests that this appeal be summarily dismissed. In the alternative, since retrial under the facts of the instant case would clearly contravene the Double Jeopardy clause of the Fifth Amendment, defendant respectfully submits that the order below dismissing the information should be affirmed.

Respectfully submitted,

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